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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KENNETH HILTON,
Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,
Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, U.S. CONFERENCE OF MAYORS, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Federal Employers' Liability Act subjects the States to suits for damages.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a vital interest in all aspects of the law that affect state and local governments.

This case presents the question whether the general and indefinite jurisdictional statement of the Federal Em-

ployers' Liability Act (FELA) should be read to create a cause of action for damages against a State notwithstanding the well-established principle that is at the very core of the sovereign immunity doctrine—that the sovereign cannot be sued in its own courts without its consent.

The Supreme Court of South Carolina correctly concluded that the FELA does not subject the States to damages actions. Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

Petitioner Kenneth Hilton filed an FELA action in federal district court alleging that he was injured while employed by respondent South Carolina Public Railways Commission. *See* Pet. 3. After this Court held in *Welch v. Texas Dep't of Highways*, 483 U.S. 468 (1987) that a legally equivalent action under the Jones Act, 46 U.S.C. App. § 688(a), could not be maintained against a State in federal court, Hilton dismissed his federal court action and refiled his FELA claim in state court. *See* Pet. 3. The trial court, finding that a State is not subject to the FELA, dismissed Hilton's claim. Pet. App. 19. The South Carolina Supreme Court affirmed for the reasons it had earlier articulated in *Freeman v. South Carolina Public Rys. Comm'n*, 393 S.E.2d 383 (1990). Pet. App. 7-8.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented is whether, by the terms "every common carrier by rail", the FELA subjects the States to damages suits brought by individuals. We agree with petitioner's supporting *amicus* AFL-CIO that merely "[s]tating the question presented suffices to show that this case arises in the sensitive area of federal-state rela-

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[1] The parties' letters of consent have been filed with the clerk pursuant to Rule 37.3 of this Court.

tions." (Br. 4). Indeed, it is precisely because this case directly affects the constitutional balance between the States and the federal government that the Court should apply the "ordinary rule of statutory construction" that requires a federal statute to contain unmistakably clear statutory language before a court may conclude that Congress has created an action for damages against the States. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989).

Both petitioner and his supporting *amicus* err in contending that this case should be resolved without reference to the clear statement rule. Our federal scheme requires clear evidence of congressional intent to limit the sovereign authority of the States before the States can be subjected to a damages suit brought by an individual. Because the FELA does not clearly manifest Congress's intent to include the States within the class of entities that may be sued, an FELA damages claim may not be asserted against the States. Moreover, the fact that Congress did not abrogate the States' Eleventh Amendment federal court immunity when it enacted the FELA, *see Welch v. Texas Dep't of Highways*, 483 U.S. 468 (1987), strongly supports the conclusion that Congress did not intend to subject the States to state court suits under the statute. As far as *amici* are aware, there is no precedent for Congress having created a federal cause of action against the States for damages that can be brought in state court, but not in federal court. Nor would Congress have created such an unusual regime absent a clear expression of its intention to do so.

The FELA must also be construed consistent with legislative understanding contemporaneous with its passage. When the FELA was passed in 1908, the sovereign's immunity from suits for damages was unquestioned. While the FELA explicitly did away with a number of tradi-

tional common-law defenses, it did not change this core premise of the law.

ARGUMENT

CONGRESS DID NOT SUBJECT THE STATES TO SUITS FOR DAMAGES UNDER THE FELA

I. The States Are Not Subject to Damages Actions Under Federal Legislation Absent a Clear Expression of Congressional Intent

1. The basic principles controlling this case are settled. A proper respect for the States' position in the constitutional scheme requires that courts take special care in determining whether the federal government has decided in any given instance to exercise power in a manner directly affecting state sovereignty. "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention [to do so] unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *see also Welch* at 476-77 (plurality opinion); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984) (*Pennhurst II*). Congress must likewise clearly express its intent to subject the States to damages suits by individuals. *Will*, 491 U.S. at 65.

The clear statement rule is an indispensable means of safeguarding the States' sovereignty and thereby preserving the constitutional balance of authority between the federal government and the States. *See Will*, 491 U.S. at 65; *Atascadero State Hospital*, 473 U.S. at 242. On numerous occasions, this Court has emphasized the importance of this rule. For instance, Congress's power to abrogate the States' Eleventh Amendment immunity "means that in certain circumstances the usual constitutional balance between the States and the Federal Government does not obtain"; accordingly, a court must be certain that Congress intended to exercise that

power before concluding that the States are subject to the jurisdiction of the federal courts. *Id.* Similarly, because legislation grounded in Congress's power under the Fourteenth Amendment "imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority," there is a compelling need to ensure that Congress in fact intended that result. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 16 (1981) (*Pennhurst I*). Requiring a clear statement "provides assurance that 'the federal-state balance' * * * will not be disturbed unintentionally by Congress or unnecessarily by the courts". *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citations omitted). " 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' " *Will*, 491 U.S. at 65, quoting *United States v. Bass*, 404 U.S. 336, 349 (1971). *See also Welch*, 483 U.S. at 477; *Parden v. Terminal Ry.*, 377 U.S. 184, 199 (1964) (White, J., dissenting).

The necessity of a clear statement is integral to Eleventh Amendment jurisprudence. *Will* establishes that the requirement is equally necessary here. *See* 491 U.S. at 65. Ambiguity surrounding Congress's intent is particularly troublesome in the area of sovereign immunity, when (as in this case) a federal statute is asserted to require a State's courts to entertain damages claims against the State in clear contravention of that doctrine. Sovereign immunity ensures that "[w]ithout [a State's] consent it cannot be sued *in any court, by any person, for any cause of action whatever.*" *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911) (emphasis added). Congressional action that nevertheless subjects the States to individuals' damages suits substantially intrudes upon state sovereignty: "Mr. Chief Justice Jay described sovereignty as 'the right to govern'; that kind

of right would necessarily encompass the right to determine what suits may be brought in the sovereign's own courts." *Nevada v. Hall*, 440 U.S. 410, 415 (1979) (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793)).

It is not even clear that Congress has the authority to require unwilling state courts to hear suits against the States. *Amici* are not aware of a single case in which state courts have been required to entertain federal law damages actions that federal courts cannot entertain. *Cf. Employees v. Missouri Public Health Dep't*, 411 U.S. 279, 287 (1973) (declining to reach question whether state court required to hear action federal court barred from hearing). Nor are we aware of any case in which the Court has addressed the scope of Congress's authority to require state courts to hear such cases—apparently because the federal government has never attempted to confer such jurisdiction on unwilling state courts. *Cf. FERC v. Mississippi*, 456 U.S. 742, 759, 764-765 (1982) (addressing scope of congressional authority to use state regulatory machinery to advance federal goals). It is clear, however, that from the time of the ratification of the Constitution it has been "an 'established principle of jurisprudence' that the sovereign cannot be sued in its own court without consent." *Will*, 491 U.S. at 67 (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)); *see Nevada v. Hall*, 440 U.S. at 420; *id.* at 431 (Blackmun, J., dissenting). In the infrequent instances in which the issue has been litigated, the Court accordingly has indicated that States may assert sovereign immunity to preclude even federal constitutional claims in state court. *See Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929); *Palmer v. Ohio*, 248 U.S. 32, 34 (1918); *Hopkins*, 221 U.S. at 642.

As the plurality indicated in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 22 (1989), where Congress has included in the legislation an unmistakably clear statement, the States may be deemed to have consented to the assertion against them in federal court of suits "based on congressionally created causes of action." *See also Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). But the States' authorization of the creation by Congress of federal court remedies does not mean that, in ratifying the Constitution, the States took the far more radical step of waiving the protection of sovereign immunity in their own courts. Indeed, while the amenability of States to suit in federal court under Article III was debated extensively at the time of the Constitution's ratification, *see Welch*, 483 U.S. at 480-484 (plurality opinion); *id.* at 504-507, 511-513 (Brennan, J., dissenting); *Atascadero State Hospital*, 473 U.S. at 263-280 (Brennan, J., dissenting), *amici* are aware of no suggestion during these debates that *state courts* might be obligated to entertain claims against States. That is hardly surprising: it was and remains a fundamental tenet of sovereign immunity that, wherever else it may be hauled into court, "no sovereign may be sued in its own courts without its consent." *Nevada v. Hall*, 440 U.S. at 416.

It is clear to us that the Court should not attempt to resolve difficult questions about the scope of federal authority to require state courts to hear actions against the States, absent a crystal clear statement of Congress' intent to require the exercise of state court jurisdiction.[2]

[2] It is doubtful that Congress even has the constitutional authority to expand the jurisdiction of unwilling state courts in this manner. *See Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring) ("Neither Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction upon the New York courts"); *Claflin v. Houseman*, 93 U.S. 130, 141 (1876) ("Not that Congress could confer jurisdiction upon the State courts"). Nor is the existence of such congressional authority necessary to safeguard federal interests. "Since the rights involved are based upon Acts of Congress, there is no reason to fear that Congress would fail to give adequate protection to these rights" by making an action available in the federal courts. T. Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 207 n.85 [hereinafter Sandalow].

Where the question is one of constitutional dimension—whether a federal statute *requires* the States to be subjected to federally created damages claims in their own courts—the answer may be arrived at only through a strict application of the clear statement rule. "In the absence of a declaration by Congress that state courts must enforce rights that Congress has created, there appears to be no reason why the Supreme Court should impose such an obligation." Sandalow, *supra*, at 207.

2. Petitioner (Br. 4-5) and his supporting *amicus* (Br. 4-5) argue that this Court's decisions under the Eleventh Amendment are not relevant to this case. *Amici* recognize that the Eleventh Amendment does not apply in state courts, *see Will*, 491 U.S. at 63-64, and that the resolution of the question whether a statute abrogates the States' Eleventh Amendment immunity is not in itself dispositive of the question whether the statute creates a cause of action against the States. *See Welch*, 483 U.S. at 476 n.6.[3]

Will nevertheless establishes that Congress will not be deemed to have subjected the States to individual damages actions, either in state or federal court, unless Congress makes "its intention to do so 'unmistakably clear in the language of the statute.'" *Will*, 491 U.S. at 65, quoting *Atascadero State Hospital*, 473 U.S. at 242. The Court looks to the Eleventh Amendment as a guide in determining whether Congress intended that a federal cause of action apply to the States. "[I]n deciphering congressional intent as to the scope of a statute, "the scope of the Eleventh Amendment is a consideration."

[3] Presumably Congress could, for example, do something that it clearly has not done here—enact a statute that expressly preserves the States' Eleventh Amendment immunity but at the same time expressly includes the States within the class subject to liability on the federal claim.

Will, 491 U.S. at 66-67. This Court has declined to construe a statute in disregard of the Amendment. *See id.*[4]

The Court's Eleventh Amendment jurisprudence is relevant to this case because of the close relationship between the pivotal issue of statutory construction under the Eleventh Amendment—whether Congress intended to subject the States to suit in federal court—and the question here: whether Congress intended to subject the States to individual damages actions. Given the close similarity of the inquiries, Congress would expect them to be answered in the same way, pursuant to the same canon of statutory construction, in order to avoid inconsistent interpretations of the same statute.

Moreover, applying different statutory interpretation standards to the liability and Eleventh Amendment issues increases the chances that the courts will create a class of federal law actions against the States that may be brought only in state court—a peculiar result that is most unlikely to reflect what Congress meant to accomplish. Congress would not make "[s]uch a major change in the existing rules * * * without specific provision in the text of the statute." *United Savings Ass'n v. Timbers of Inwood Forest*, 484 U.S. 365, 380 (1988) (citation omitted).

3. There is no basis for declining to apply *Will's* clear statement rule in this case. The AFL-CIO argues that the rule of *Will* applies only in suits directed against

[4] As *Will* establishes, requiring a clear statement of congressional intent before allowing an individual to bring a federal action for damages against a State is consistent with similar requirements not only in the Eleventh Amendment context but in other areas of the law. Thus *Will* noted that the Court applies clear statement requirements in determining, for example, whether Congress intended "to pre-empt the historic powers of the States," 491 U.S. at 65 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230) or "to impose a condition on the grant of federal moneys." 491 U.S. at 65 (citing *Pennhurst I*, 451 U.S. at 16; *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)).

"historic powers" of the States. (Br. 2-3, 7-9.) Under this view, a court need only apply the unmistakably clear statement rule in determining whether Congress has created a damages action directed against "governmental" functions of a State; a court need not apply the rule to determine whether Congress has created a damages action against a state-operated enterprise.

This argument is based on a misreading of *Will*. While the clear statement doctrine that was applied to *Will*'s state court action had its origins in Eleventh Amendment jurisprudence, *see Will*, 491 U.S. at 65, citing *Atascadero State Hospital*, 473 U.S. at 242, the *Will* Court made it clear that "a similar approach" of requiring a clear congressional statement "is applied in other contexts." 491 U.S. at 65. The "historic powers" language that the AFL quotes is not a limitation on *Will*'s holding, but is instead lifted from one of the examples that *Will* gave of other areas in which a clear statement is required: the requirement of a clear congressional statement to pre-empt the historic regulatory powers of the States. *See Will*, 491 U.S. at 65 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230); *see also* note 4, *supra*. In arguing that an unmistakably clear statement of congressional intent is necessary only when determining whether Congress has created a damages action directed against the States' "historic powers", the AFL has incorrectly sought to narrow the clear statement rule in a manner contrary to its formulation in *Will*. The necessity of a clear statement is not dependent upon the state function against which the federal action is directed. It is necessary because, as we have demonstrated above (*see* pp. 5-7, *supra*), forcing a State's own courts to hear damages actions against the State is a fundamental interference with the sovereign power of the States to determine whether they may be sued in their courts.[5]

[5] In an effort to establish that *Will* itself is based upon an implicit distinction between "historic" governmental powers and state-operated enterprises, the AFL also (Br. 12) relies upon *Will*'s discussion of *Jefferson County Pharmaceutical Ass'n v. Abbott Labs*, 460 U.S. 150 (1983). *See Will*, 491 U.S. at 64-65 n.5. According to the AFL, the governmental/proprietary distinction is at the basis of *Will* because *Will* noted that the decision in *Jefferson County* (which allowed an injunctive action against a state-operated enterprise) was limited to state purchases for the purpose of competing against private enterprise. Seizing upon *Will*'s statement that an action against state purchases for traditional governmental functions would present a more difficult question because it might well "affect the federal balance", *id.* (citation omitted), the AFL argues that *no* action affects the federal balance when it is directed against a State's providing services which are also provided by private enterprise.

In so arguing, the AFL seeks to transform equivocal dicta into a clear statement of law. The AFL ignores the primary basis upon which *Will* distinguished *Jefferson County*: *Will*, like the instant case, was an action for damages; *Jefferson County* was an injunctive action in which the damages claim had already been dismissed as barred under the Eleventh Amendment. *See* 491 U.S. at 64-65 n.5 (citing *Jefferson County*, 460 U.S. at 153 n.5). This distinction between damages and injunctive relief is "commonplace in sovereign immunity doctrine." *Will* 491 U.S. at 71 n.10 (quotation omitted).

The distinction the AFL seeks to create also leads this Court back to the governmental/proprietary functions analysis rejected in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). While *amici* have grave reservations about whether the *Garcia* Court gave proper weight to the constitutional role of states in reaching its result, for purposes of this case this much is certain: *Garcia* abolished the governmental/proprietary distinction upon which the AFL relies. And as this Court noted in *Welch* (when construing the applicability of the Jones Act to a state function that the AFL would no doubt describe as proprietary), "the constitutional role of the States sets them apart from other employers and defendants." *Welch*, 483 U.S. at 477; *see also Atascadero State Hospital*, 473 U.S. at 246; *Pennhurst II*, 465 U.S. at 99; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Quern v. Jordan*, 440 U.S. 332, 342-343 (1979).

The central role that the governmental/proprietary distinction plays in the AFL's argument is evident from the weight given to *Ohio v. Helvering*, 292 U.S. 360 (1934) and its progeny. *See* Br. 3, 11-17. The AFL cites *Helvering* for the twin propositions that (1) applying the FELA to the States is merely regulation of a state-owned "business * * * of a private nature," 292 U.S. at 369, and (2) such "regulation" does not alter the usual balance between the States and the federal government. But neither *Helvering* nor its progeny establish that in operating business enterprises States lose all the protections flowing from their special position in the constitutional system. In language quoted by the AFL, the *Helvering* Court clearly limited its holding to the conclusion that a State operating an enterprise "divests itself of its *quasi* sovereignty *pro tanto* and takes on the character of a trader, so far, at least, as *the taxing power of the federal government is concerned.*" 292 U.S. at 369 (emphasis added). *Helvering* says nothing about a State's immunity from suit and sheds no light upon what rule a court should apply when Congress, having gone beyond the mere regulation of a state-operated enterprise, is asserted to have created a cause of action for citizens to sue the State for damages.

The AFL makes the same mistake in relying upon other cases in which the Court concluded that the States were subject to *regulation* (rather than to damages suits) under a federal statute. (Br. at 15, 19) (citing *California v. Taylor*, 353 U.S. 553, 562-564 (1957); *United States v. California*, 297 U.S. 175, 185-186 (1936)). As *Welch* and the dissent in *Parden* noted, the *Parden* majority mistakenly relied upon these very cases. *Welch*, 483 U.S. 476-477 & n.7 (citing *Parden*, 377 U.S. at 200, n.2 (White, J., dissenting)). *California v. Taylor* was a suit against the National Railroad Adjustment Board in which sovereign immunity was not an issue. *See* 353 U.S. at 568, n.16. *United States v. California* was a suit

brought by the United States, against which state sovereign immunity is not operative. *See Welch*, 483 U.S. 476-477 & n.7. The two decisions simply are not relevant here because the issue is not whether the States are to be subject to the same regulations as private industry; the issue is the delineation of the class of actors that Congress, in enacting the FELA, intended to subject to individuals' actions for damages.

The core premise that underlies the AFL's reliance upon *Helvering* and its progeny, that a State divests itself of sovereignty when it enters the marketplace,

> sound[s] more of *ipse dixit* than reasoned explanation. This inability to give principled content to the distinction between "governmental" and "proprietary," no less significantly than its unworkability, led the Court to abandon the distinction [in the field of tax immunity] in *New York v. United States*[, 326 U.S. 572 (1946)].

Garcia, 469 U.S. at 543. Under *Garcia*, the governmental/proprietary distinction does not exist as a criterion for determining whether States are subject to regulation; there is no basis for concluding that it nonetheless exists as a criterion for determining whether a State is subject to an individual's damages action.[6]

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[6] The AFL seeks to resurrect the governmental/proprietary distinction by arguing that there is a critical difference between using the distinction as a basis for determining the "historical fact" of congressional intent, as in this case, and as a basis for determining congressional power, as in *Garcia*. (Br. at 12-13 n.6.) But if, as the AFL states, the essence of its contention is that the statute should be construed in keeping with the "historical fact" of whether the Congress that enacted the FELA intended the statute to apply to the States, the only conclusion possible is that Congress did not so intend. As we demonstrate below (*see* pp. 16-17, *infra*), the Congress that enacted the FELA did so on the assumption that States were immune from damages suits by individuals. *See Welch*, 483 U.S. at 496 (Scalia, J., concurring in part and concurring in the judgment).

This Court should accordingly reject the invitation to treat the States as just another employer for the purpose of determining whether Congress has created an action in which individuals may sue a State for damages. Where the issue is not whether Congress intended to regulate state-operated enterprises, but whether it intended to create an action for individuals to sue a State for damages, the Court should apply the clear statement rule of *Will*.

II. Congress Has Not Clearly Indicated An Intent to Apply the FELA to the States

Given the applicability of the clear statement rule, there is no basis for determining that the FELA applies to the States. This conclusion is mandated by two reasons. First, nothing in the language of the FELA indicates that the States may be sued under the statute. Second, viewed in the contemporary legal context of its enactment, the FELA's purpose and legislative history contain no evidence that Congress intended or even anticipated that result.

A. The Statutory Language Does Not Clearly and Unequivocally Express Congressional Intent to Apply the FELA to the States

The holding in *Welch* virtually compels the conclusion that the FELA does not contain a clear and unmistakable statement of congressional intent to apply the statute to the States. Although the holding in *Welch* was predicated upon the absence of a clear statement of congressional intent to abrogate the States' Eleventh Amendment immunity, that holding rested on the determination that "Congress ha[d] not expressed *in unmistakable statutory language* its intention to allow States to be sued in federal court * * *." 483 U.S. at 475 (emphasis added). Even though the Jones Act extended to "any seaman" who suffered personal injury in the course of his employment, the Court held that "[b]ecause of the role of the States in our federal system, '[a] general authorization

for suit in federal court is not the kind of *unequivocal statutory language* sufficient to abrogate the Eleventh Amendment.'" *Id.* at 476, quoting *Atascadero State Hospital*, 473 U.S. at 246 (emphasis added). That analysis is dispositive in the present case: because Congress did not set forth with clarity its intent to override the States' sovereign immunity and subject them to damages liability, the FELA cannot be construed to impose such liability upon the States. If Congress had intended to create a cause of action directly against the States, it would have either ensured that such actions could be brought in federal court, or indicated that it was taking the unusual step of creating a class of federal actions that could only be brought in state court. It did neither.

As with any question of statutory interpretation, analysis of the scope of the FELA must begin with the relevant statutory language—here, the phrase "every common carrier by rail." 45 U.S.C. 51. The argument that every carrier must mean *every* carrier, including those owned by States, has surface appeal. As the AFL-CIO puts it, "'[I]n making the FELA applicable to "every" common carrier by railroad in interstate commerce, [Congress] meant what it said.'" Br. at 19 (quoting *Parden*, 377 U.S. at 187). This assertion does not withstand scrutiny, however.

The general jurisdictional language of 45 U.S.C. 51 is not a clear expression of Congress's intent to apply the FELA to the States. *Cf. United States v. United Mine Workers*, 330 U.S. 258, 271-273 (1947) ("statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect"). Given the fixity of the sovereign immunity doctrine, general statutory language neither gives the sovereign States adequate notice of the possibility that they may be held accountable in damages, nor demonstrates that Congress specifically contemplated

that possibility. *See id.; see also Welch*, 483 U.S. at 477 (citing *Parden*, 377 U.S. at 198-199 (White, J., dissenting)). In the Eleventh Amendment context this Court has repeatedly stated that a formal indication of Congress' intent to abrogate the States' immunity ensures that Congress does not impose fiscal burdens on the States inadvertently. *See Quern*, 440 U.S. at 344 n.16; *Hutto v. Finney*, 437 U.S. 678, 697 n.27 (1978); *Employees v. Missouri Public Health Dep't*, 411 U.S. at 279, 284-285. The constitutional safeguard of deliberateness is lost if the right of individuals to bring damages actions against States can be inferred from general language in federal legislation without *any* indication (much less a clear one) that Congress intended that result.

B. The Contemporary Legal Context of the FELA Shows That Congress Did Not Intend to Impose Liability on the States

1. The "contemporary legal context" of legislation must be taken into account in determining Congress' intent. *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979). As Justice Scalia noted in his concurrence in *Welch*, Congress enacted the FELA

> on the assumption that States were immune from suits by individuals. Even if we were now to find that assumption to have been wrong, we could not, in reason, interpret the statutes as though the assumption never existed. Thus, although the terms of the Jones Act (through its incorporation of the FELA) apply to all common carriers by water, I do not read them to apply to States. For the same reason, I do not read the FELA to apply to States, and therefore agree with the Court that *Parden* * * * should be overruled.

Welch, 483 U.S. at 496 (Scalia, J., concurring in part and concurring in the judgment).

Justice Scalia's formulation accurately reflects the understanding of the legislators who enacted the FELA.

For decades before the Act was passed in 1908, the rule that "the sovereign cannot be sued *in his own courts* without his consent" was "a familiar doctrine of the common law". *The Siren*, 74 U.S. (7 Wall.) 152, 153-54 (1869) (emphasis added). "It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government." *Id.* at 154; *see also Railroad Co. v. Tennessee*, 101 U.S. (11 Otto) 337, 339 (1880) ("The principle is elementary that a State cannot be sued *in its own courts* without its consent.") (emphasis added); *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1869); *Beers v. Arkansas*, 61 U.S. (20 How.) at 529; J. Dillon, *Treatise on the Law of Municipal Corporations* § 14 (1872). State sovereign immunity has common law roots reaching well back into English history. *See generally* 5 F. Harper, F. James & O. Gray, *The Law of Torts*, §§ 29.1-29.4, at 596-618 (2d ed. 1986).

The legislative history of the FELA also supports the conclusion that it was not meant to apply to the States. The Act revolutionized the tort system by sweeping away a large number of traditional common law defenses. *See Rogers v. Missouri Pac R.R. Co.*, 352 U.S. 500, 507-508 (1957); *Second Employers' Liability Act Cases*, 223 U.S. 1, 49-50 (1912). The legislative history plainly sets out the ways in which the Act affected preexisting common-law rules:

> The purpose of this bill is to change the common-law liability of employers of labor in this line of commerce, for personal injuries received by employees in the service. It abolishes the strict common-law rule of liability which bars a recovery for the personal injury or death of an employee, occasioned by the negligence of a fellow-servant. It also relaxes

> the common-law rule which makes contributory negligence a defense to claims for such injuries.

H.R. Rep. No. 1386, 60th Cong., 1st Sess. 1 (1908); *see* S. Rep. No. 460, 60th Cong., 1st Sess. 1 (1908).

The FELA addressed and explicitly changed four specific aspects of the common law: it abolished the fellow servant rule, assumption of risk, contributory negligence, and waiver of the right to sue. Sovereign immunity was left untouched. *See* 42 Cong. Rec. 4527 (1908) (statement of Sen. Dolliver) ("These are the four propositions contained in the bill."); *id.* at 4427 (statement of Rep. Henry) (bill changes four rules of the common law). It can only be concluded that Congress intended to incorporate the common law doctrine of sovereign immunity to limit the scope of liability under the FELA. *Cf. Will*, 491 U.S. at 67-68 (absent clear statement, Court would not conclude that statute was intended to disregard sovereign immunity).

2. In an effort to establish that the FELA applies to the States, Hilton (Br. 11) relies upon *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959); both Hilton (Br. 11) and the AFL (Br. 5-6, 19) rely upon *Parden*. This reliance is misplaced.

The defendant in *Petty* was not a State, but a bi-State entity created with the consent of Congress, as required by the Compact Clause. *See Petty*, 359 U.S. at 277 (citing U.S. Const. art. I, § 10, cl. 3). For the purpose of its Eleventh Amendment waiver analysis, the Court "assume[d] *arguendo*" that the suit had to be "considered as one against the States". *Id.* at 279. Any suggestion in *Petty* that the FELA applies to States is dicta. Since a bi-State agency is at least as much a creature of Congress as of the States, the considerations underlying the clear statement rule for questions of statutory construction do not necessarily apply. And even if *Petty* did assume that the FELA applied to the States, *sub silentio* holdings do not bind this Court in a subsequent case that brings an issue squarely before it. *See Will*, 491 U.S. at 63 n.4 (citing *Hagans v. Lavine*, 415 U.S. 528, 535 n.5 (1974)).

Like *Petty*, *Parden* turned on the waiver of Eleventh Amendment immunity. *See* 377 U.S. at 186. *Welch* overruled *Parden* to the extent that *Parden* held that general statutory language—in that case the same reference to "every common carrier by railroad," *see id.* at 185, at issue here—could nullify such immunity. *See Welch*, 483 U.S. at 476-478. We submit that *Parden*'s analysis of the applicability of the statute to the States is undermined by the same misreading of this general language. *See also Welch*, 483 U.S. at 496 (Scalia, J., concurring in part and concurring in the judgment) (*Parden* should be overruled to extent that it holds that FELA applies to the States). While the AFL argues (Br. 24-26) that *Parden*'s statutory holding should be retained at least as a matter of *stare decisis*, we note that "the same respect for the rule of law that requires [this Court] to seek consistency over time also requires [it] * * * to seek consistency in the interpretation of an area of law at any given time." *Arkansas Electric Co-op v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391 (1983). That portion of *Parden* not reached in *Welch* should be overruled in this case.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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